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Nos. 89-1027 and 89-1028

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

NORFOLK AND WESTERN RAILWAY COMPANY AND SOUTHERN RAILWAY COMPANY, *Petitioners*,

v.

AMERICAN TRAIN DISPATCHERS ASSOCIATION, INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, *Respondents*.

CSX TRANSPORTATION, INC., *Petitioner*,

v.

BROTHERHOOD OF RAILWAY CARMEN, DIVISION OF TRANSPORTATION-COMMUNICATIONS INTERNATIONAL UNION, INTERSTATE COMMERCE COMMISSION, AND UNITED STATES OF AMERICA, *Respondents*.

**On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF *AMICUS CURIAE* OF CONSOLIDATED RAIL CORPORATION IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

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**On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF *AMICUS CURIAE* OF CONSOLIDATED RAIL CORPORATION IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI

### INTEREST OF *AMICUS CURIAE*

Consolidated Rail Corporation ("Conrail") is a rail carrier headquartered in Philadelphia, Pennsylvania. It primarily offers freight service in the northeast and midwest corridors over more than 28,000 miles of track. Conrail's 1988 year-end operating revenues exceeded $3.4

billion and its total assets as of the end of 1988 exceeded $7 billion.[1]

After nearly 20 years of efforts to restructure the northeast and midwest rail systems, Conrail has emerged as a publicly owned, self-sustaining corporation. Like all rail carriers, Conrail faces the constant challenge of remaining competitive in an increasingly deregulated transportation market. This challenge may require Conrail to enter into "control" transactions[2] that must be approved by the Interstate Commerce Commission ("Commission" or "ICC"). The court of appeals decided that the Commission's approval of a control transaction does not permit participating rail carriers to implement the approved transaction when it conflicts with the requirements of private contracts (including, for example, collective bargaining agreements). That decision is therefore of great significance to Conrail and threatens to have an immediate and deleterious impact upon its corporate planning and the efficiency of its operations.

## ARGUMENT

The decision below is wrong. It conflicts with the decision of this Court in *Schwabacher* v. *United States*, 334 U.S. 182 (1948), and with the decisions of every other court of appeals that has considered the issue. The court of appeals rejected the Commission's interpretation of the statute it administers and did so on a basis that disregarded the standards of *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

[1] This brief is filed pursuant to Rule 37.2 of the Rules of this Court, accompanied by the written consent of all parties.

[2] Control transactions include mergers, consolidations, purchases, leases, contracts to operate property of another carrier, acquisitions of trackage rights and other acquisitions of control. 49 U.S.C. § 11343(a).



The decision below has enormous consequences for Conrail and other rail carriers and disregards the protection for railroad employees Congress deemed appropriate. Contrary to the assertion of the federal respondents, proceedings on remand will not obviate the need for review of the question presented. Delaying such review would cause significant disruption in corporate planning decisions and create uncertainty that will adversely affect the public interest. For these reasons, which we discuss below, review now is warranted.

1. The court of appeals held that Section 11341(a) of the Interstate Commerce Act ("ICA"), 49 U.S.C. § 11341(a), does not permit carriers participating in an ICC-approved control transaction to implement the transaction when it conflicts with the requirements of a collective bargaining agreement. Pet. App. No. 89-1027 at 12a, 19a. Section 11341(a) provides that a carrier participating in an approved control transaction "is exempt from the antitrust laws and from *all other law*, including State and municipal law, as necessary to let that person carry out the transaction . . .." (Emphasis added.)

In the court of appeals' view, "all other law" comprehends only "positive enactments, not common law rules of liability, as on a contract." Pet. App. No. 89-1027 at 18a.[3]

[3] The previous version of § 11341(a), former § 5(11) of the ICA, immunized participants "from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal," thus making clear that the immunity encompasses not only positive enactments, but all restraints, limitations and prohibitions of law. The 1978 recodification of this provision as § 11341(a) did not effect any substantive change. Act of Oct. 13, 1978, Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466. *See also* H.R. Rep. No. 95-1395, 95th Cong., 2d Sess. 158-68 (1978).

This narrow interpretation of the meaning of "law" harks back to another case involving a railroad decided more than half a century ago. The issue in *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), was whether the phrase "laws of the several states" as used in the Rules of Decision Act, 28 U.S.C. § 1652, meant only statutory law or included common law. This Court held, of course, that "laws" meant both.[4]

Section 11341(a) therefore does not support the meaning the court of appeals gave it. To be sure, Section 11341(a) does not expressly refer to contracts. But contracts can impede control transactions because they have the force of law behind them—that is, because they are legally enforceable.[5] Thus, prior decisions had recognized

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[4] *See also Munn* v. *Illinois*, 94 U.S. 113, 125-26, 133-34 (1877) (power to regulate commerce is superior to the power of private citizens to create rights at common law where the subject matter is affected with a public interest); *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) (ICA abandonment procedures preempt state tort claims based on alleged violation of state common law); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 246-47 (1959) (Supremacy Clause preempts state common law rights that interfere with federal policies); *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) (ICA preempts state common law action by shipper for allegedly unreasonable rate).

Similarly, this Court has long held that the federal government acting lawfully under the Commerce Clause may modify private contracts concerning matters within the government's regulatory powers without violating the Fifth Amendment. *Connolly* v. *PBGC*, 475 U.S. 211, 225 (1986); *Norman* v. *Baltimore & O. R.R.*, 294 U.S. 240, 306 (1935).

[5] Moreover, the law giving effect to collective bargaining agreements is not the common law, but a "positive enactment," the Railway Labor Act ("RLA"), *see* 45 U.S.C. § 152 Seventh. *Detroit & Toledo Shore Line R.R.* v. *United Transp. Union*, 396 U.S. 142, 156 (1969) (§ 152 Seventh of RLA "operates to give legal and binding effect to collective agreements"); *Andrews* v. *Louisville & Nashville R.R.*,



that Section 11341(a) immunizes participants from all legal obstacles, not simply from positive enactments. *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794, 800 (1st Cir. 1986), *cert. denied*, 479 U.S. 829 (1987); *Brotherhood of Locomotive Engineers* v. *ICC*, 761 F.2d 714, 717, 723 (D.C. Cir. 1985), *rev'd on other grounds*, 482 U.S. 270 (1987).

2. This was also the Commission's interpretation of Section 11341(a) and, under *Chevron*, *supra*, the court of appeals was bound to respect it. The Commission clearly and succinctly stated its interpretation of Section 11341(a) in two recent rail cases before this Court.[6]

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406 U.S. 320 (1972) (rail labor agreements not enforceable in state court). Thus, even assuming the court of appeals' distinction between common law and positive enactments were correct, its holding is nevertheless clearly erroneous and should be reversed.

[6] In its Petition for a Writ of Certiorari at 14-15, *ICC* v. *Brotherhood of Locomotive Engineers*, No. 85-792, Oct. Term, 1985, the Commission stated that, under § 11341(a), "the Commission's power to approve consolidations includes the power to approve transactions which require the negotiation of changes in working conditions and to establish the means by which negotiation of such changes shall be effected" and that "if the Commission does so, RLA processes for resolving labor problems arising directly out of the approved transactions are overridden by virtue of . . . Section 11341(a)." "Such a result is necessary because no activity by any party can be allowed to frustrate consummation of the transaction authorized by the Commission and the public interest in that transaction which the Commission's approval entails." Brief for the Interstate Commerce Commission at 20, *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Execs' Ass'n*, No. 87-1589, Oct. Term, 1988.

The Commission has routinely applied this interpretation in its jurisprudence. *E.g.*, *Maine Central R.R.—Exemption from 49 U.S.C. 11342 and 11343*, Fin. Docket No. 30,532 (decision served Sept. 16, 1985), *aff'd mem. sub nom. Railway Labor Execs' Ass'n* v. *ICC*, 812 F.2d 1443 (D.C. Cir. 1987); *Denver & Rio Grande Western*

Early in its opinion, the court correctly cited *Chevron* for the proposition that judicial deference is inappropriate if "Congress has directly spoken to the precise question at issue" (*Chevron*, 467 U.S. at 842-43). Pet. App. No. 89-1027 at 11a. The court then proceeded to "strike out" in search of Congress' intent. *Id.* The court's search, however, revealed no "unambiguously expressed intent of Congress" (*Chevron*, 467 U.S. at 843) to exclude collective bargaining agreements from the scope of Section 11341(a) immunity. Pet. App. No. 89-1027 at 12a-19a. The most the court could say on this score was that Congress had never directly faced the question. *Id.* at 18a.[7]

Under *Chevron*, the court was then required to advance to the second step of analysis—namely, to determine whether the Commission's interpretation of Section 11341(a) was permissible. *Chevron*, 467 U.S. at 843.

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*R.R.—Trackage Rights—Missouri Pac. R.R.*, Fin. Docket No. 30,000 (Sub-No. 18) (decision served Oct. 25, 1983), *vacated on other grounds sub nom. Brotherhood of Locomotive Engineers* v. *ICC*, 761 F.2d 714 (D.C. Cir. 1985), *rev'd*, 482 U.S. 270 (1987).

The United States has interpreted § 11341(a) the same way. Brief for the Interstate Commerce Commission and the United States of America at 24, *ICC* v. *Brotherhood of Locomotive Engineers*, No. 85-792, Oct. Term, 1985 ("Section 11341(a) automatically confers an exemption of sufficient breadth to permit implementation of the authorized transaction"); Brief for the United States as *Amicus Curiae* at 9 n.8, *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Execs' Ass'n*, No. 87-1589, Oct. Term, 1988.

[7] We submit that the court of appeals erred when it concluded that Congress had not spoken directly to the issue in enacting § 11341(a). As we have shown (*see supra* at 3-5), the language of the statute is clear, and it is equally clear that Congress intended to immunize carriers not merely from positive enactments, but from all restraints, limitations and prohibitions of law.



Instead of doing so, however, the court simply supplied its judgment regarding the meaning of Section 11341(a).[8]

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[8] Further, contrary to the court of appeals' belief, the legislative history of the Transportation Act of 1920 does not support its interpretation of § 11341(a). While Congress was undoubtedly concerned with protecting carriers from the Clayton Act and certain state statutes, it chose immunity language broadly covering "all restraints, limitations, and prohibitions of law." *See supra* n.3. Moreover, Title III of the 1920 Act provided for comprehensive regulation of collective bargaining for the rail industry, and Congress did *not* exempt that Title from the 1920 Act's public interest regulation or its immunity provision. The lack of such exemption is especially significant because Congress expressly provided that at least two other sections of the 1920 Act *were* exempt from these provisions. *See* § 400 of the Transportation Act of 1920, ch. 91, 41 Stat. 456, 474-75 (amending § 1 of the ICA so as not to apply to interstate activities and certain water carrier activities); § 402 of the Transportation Act of 1920, ch. 91, 41 Stat. 456, 476-78 (amending § 1 of the ICA so as not to apply to spur and industrial tracks).

Moreover, when Congress enacted the RLA in 1926, it did not exempt labor matters from the ICC's delegated powers under current §§ 11343 and 11344 and the immunity from all other law under current § 11341(a). Finally, in 1933 Congress enacted the Emergency Railroad Transportation Act ("ERTA"), ch. 91, 48 Stat. 211. Title I of ERTA was temporary legislation limited to a one-year period, and contained a savings clause for RLA rights and labor contracts: "nothing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act." 48 Stat. at 215. Title II of ERTA restated current § 11344 of the ICA, with the same public interest standard for approval of control transactions, and continued current § 11341(a) immunity. Unlike Title I, however, Title II contained no RLA or collective bargaining agreement savings clause. If Congress had intended to remove the RLA and collective bargaining agreements from §§ 11343 and 11344 public interest regulation and § 11341(a) immunity, it would have extended the Title I savings clause to Title II. Its decision not to do so reflects "an intentional distinction." *Texas* v. *United States*, 292 U.S. 522, 534 (1934).

While the court of appeals did not specifically explain its refusal to address the second part of the *Chevron* test, it suggested that deference was not warranted because it believed the Commission had previously interpreted the statute differently. Pet. App. No. 89-1027 at 13a (citing *Gulf, Mobile & Ohio R.R.—Abandonment*, 282 I.C.C. 311, 335 (1952)); *id.* at 22a-23a. But as Justice Scalia recently explained, "there is no apparent justification for holding the agency to its first answer, or penalizing it for a change of mind. *** [T]here seems to me no reason to value a new interpretation less than an old one." Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517, 518 (1989). Moreover, the court of appeals was not correct that the Commission had changed its mind. The *Gulf, Mobile* case was a line abandonment case, not a control transaction, and Section 11341(a) was therefore not at issue.[9]

At all events, the Commission's interpretation of Section 11341(a) was permissible and thus entitled to deference.[10] In addition to the plain language of the statute

[9] If anything, *Gulf, Mobile* is consistent with the Commission's longstanding interpretation of Section 11341(a). The Commission held that it could not override contracts in abandonment cases absent "a clear grant of statutory authority similar to that contained in [§ 11341(a)]." 282 I.C.C. at 335.

[10] Despite its longstanding interpretation of § 11341(a), the Commission has stated that it does not "dispute the validity" of the court of appeals' decision. *Brandywine Valley R.R.—Purchase—CSX Transp., Inc.*, 5 I.C.C.2d 764, 772 n.5 (1989). We assume that this statement simply reflects the Commission's intent to comply, as it must, with the court of appeals' decision on the basis of law of the case and *stare decisis* principles, and does not reflect Commission approval of the court of appeals' interpretation of § 11341(a).

The Commission's present position in no way moots the issue in these cases. Indeed, the Commission's apparent acquiescence is itself a compelling reason for this Court to review the decision below: if the ICC is allowed to acquiesce, the decision below will become the law of the land, thus "overruling" this Court's decision in *Schwabacher, supra*.



(and its predecessor version), the numerous decisions of this Court holding that the ICA preempts state common law and private rights based on common law support the Commission's interpretation of Section 11341(a).

Moreover, the primary goal of the ICA since enactment of the Transportation Act of 1920 has been to encourage and facilitate control transactions in order to promote efficiency and strengthen the railroad economy. S. Rep. No. 1182, 76th Cong., 3d Sess. Pt. 1, 1 (1940) (Transportation Act of 1920 was designed to "encourage[] mergers and consolidations of railroad companies, under the supervision of the Interstate Commerce Commission, in the hope of bringing about a stronger national railroad economy"); *County of Marin* v. *United States*, 356 U.S. 412, 416 (1958) (Transportation Act of 1940 was designed "to facilitate merger and consolidation in the national transportation system"); *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 2584, 2596-97 (1989) (Railroad Revitalization and Regulatory Reform Act of 1976 and Staggers Act of 1980 were "aimed at reversing the rail industry's decline through deregulatory efforts, above all by streamlining procedures to effectuate economically efficient transactions"). The Commission's interpretation of Section 11341(a) is consistent with and promotes this goal.

Finally, Congress has given the Commission exclusive and plenary jurisdiction over control transactions. Section 11341(a) states that the ICC's power over control transactions "is exclusive." The enacted version of Section

11341(a), which was recodified without substantive change (*see supra* n.3), stated that the ICC's power over such transactions "shall be exclusive and plenary." This Court has recognized that the ICC has "plenary authority over rail transportation" (*Pittsburgh & Lake Erie R.R.*, *supra*, 109 S. Ct. at 2596) and that Congress has delegated to the ICC the power to accommodate public and private interests in control transactions (*United States* v. *Lowden*, 308 U.S. 225, 234-38 (1939)). The Commission's exclusive and plenary jurisdiction in this area is a compelling reason to defer to its interpretation.

3. Congress has ensured that the interests of railroad employees remain fully protected notwithstanding Section 11341(a). Since this Court's decision in *Lowden*, *supra*, it is clear that the Commission must consider employee interests as part of its public interest determination in control transactions. *See also* 49 U.S.C. § 11344(b)(1). Moreover, under Section 11347 of the ICA, 49 U.S.C. § 11347, the Commission is required to impose minimum conditions in favor of railroad employees in *every* control transaction. The Commission must require the carriers to provide employees with a "fair arrangement" adequately protecting their interests. The minimum conditions the ICC must impose include six years of wage and benefit guarantees and seniority adjustment procedures. The Commission, of course, may impose additional conditions in favor of employees. Finally, immunity is accorded only when necessary to enable the participating carriers to carry out the transaction as approved by the ICC.

4. The court of appeals' decision is contrary to this Court's decision in *Schwabacher*, *supra*. *Schwabacher* involved the merger of the Pere Marquette Railway with another carrier. A group of dissenting Pere Marquette



shareholders claimed that under the Pere Marquette charter, a contract enforceable under Michigan law, they were entitled to receive a certain amount for each share of stock; they challenged the merger because it provided them substantially less than that amount and thereby deprived them "of contract rights under Michigan law." *Schwabacher*, 334 U.S. at 188. The ICC approved the proposed merger, but stated that the dissenting shareholders could pursue their contract claim in state court. *Id.*

This Court rejected the ICC's approach. Relying on Section 11341(a), the Court held that once the Commission approved the merger, the new entity was relieved of any claims based on contract rights allegedly conferred by the Pere Marquette charter. *Id.* at 194-95, 201-02.[11] *See also ICC* v. *Brotherhood of Locomotive Engineers*, 482 U.S. 270, 298 (1987) (Stevens, Brennan, Marshall and Blackmun, JJ., concurring) ("[t]he breadth of the [Section 11341(a) immunity] is defined by the scope of the approved transaction"). Following *Schwabacher*, every court of appeals that has addressed the issue (except for the court below) has held that the immunity provision at issue in these cases immunizes carriers participating in an ICC-approved transaction from any obligations they would

[11] According to the court of appeals, *Schwabacher* stands only for the proposition that the "ICC may override state law granting dissenting shareholders [the] right to block [a] merger." Pet. App. No. 89-1027 at 21a. *Schwabacher* is not so limited. Michigan law did not give shareholders any substantive rights. Rather, those rights were provided contractually by the Pere Marquette charter. Michigan law simply provided that, in the case of a merger, any preexisting obligations of the merging companies (e.g., contractual obligations) attached against the new corporation. *See* Pet. No. 89-1027 at 12-13 & n.15.

otherwise have under the RLA or collective bargaining agreements, when such immunity was necessary to let them carry out the transaction.[12]

5. These cases are of great importance to the rail industry. Rail carriers face vigorous competition, not only from each other but also from other modes of transportation. To meet that competition, rail carriers have continually strived to make themselves more competitive—and their services more attractive to consumers—through control transactions, which enable them to improve efficiency by eliminating duplicative facilities. Rail carriers have planned and undertaken their activities and investments on the assumption, grounded in the ICA and relevant case law, that if efficiency and the public interest require control transactions, Section 11341(a) immunity would allow them to implement and achieve the efficiencies and other public interest benefits envisioned by the ICC when it approves the transaction, free from the impediments imposed by legal obstacles (including collective bargaining agreements) when such immunity is necessary.

Under the decision below, however, rail carriers may, in effect, first have to obtain the consent of railway labor before engaging in control transactions that could affect collective bargaining agreements. Unless the Section

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[12] *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry.*, 314 F.2d 424, 431-32 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963); *Boston & Maine Corp.*, *supra*, 788 F.2d at 800; *Nemitz* v. *Norfolk & Western Ry.*, 436 F.2d 841, 845 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971); *Missouri Pac. R.R.* v. *United Transp. Union*, 782 F.2d 107, 111-12 (8th Cir. 1986), *cert. denied*, 482 U.S. 927 (1987); *Burlington Northern, Inc.* v. *American Ry. Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974) (per curiam), *cert. denied*, 421 U.S. 975 (1975).



11341(a) immunity encompasses all legal obstacles as necessary to carry out approved control transactions, railway labor will have veto power over control transactions that the ICC has found to be in the public interest but that might affect collective bargaining agreements.[13] The Commission itself has recognized this danger.[14]

The decision of the court of appeals thus threatens to frustrate achievement of the public interest benefits of approved control transactions and deter future control transactions designed to make rail transportation even more competitive and beneficial to the consumer: rail carriers are far less likely to enter into control transactions if railway labor need merely assert collective bargaining rights to prevent the very changes motivating the transactions and making them in the public interest. In short, the decision below may chill a broad range of efficiency-enhancing control transactions, thereby inhibiting

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[13] Absent § 11341(a), if railway labor does not consent to an implementing change, the matter proceeds to negotiation pursuant to the procedures of the RLA. But, as this Court has recognized, the RLA procedures "are purposely long and drawn out" (*Brotherhood of Ry. & Steamship Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 246 (1966)), and thus effectively preclude carriers from carrying out the transaction if labor does not consent at the outset.

[14] Brief for the Interstate Commerce Commission at 34, *Pittsburgh & Lake Erie R.R.* v. *Railway Labor Execs' Ass'n*, No. 87-1589, Oct. Term, 1988:

> Any determination by the Commission that labor protections are not appropriate to a rail transaction becomes purely advisory if the transaction is subject to the RLA. Any rail transaction is henceforth subject to a rail labor veto with the invocation of the RLA. The Commission's determination about the public interest with respect to the transaction which is required to take into account among other things the interests of rail employees becomes a nullity.

rail carriers' ability to compete, all to the ultimate detriment of the consumer.

6. Despite their longstanding interpretation of Section 11341(a) and the Commission's numerous decisions giving effect to that interpretation (*see supra* n.6), the federal respondents urge the Court to deny as "premature" the petitions for writs of certiorari in these cases. Brief for the Federal Respondents in Opposition at 11. The federal respondents assert that "the Commission is presently exploring a variety of alternative bases . . . for allowing approved consolidations to go forward without resort to the extended bargaining procedures required by the RLA" and that "[i]t is entirely possible that the Commission will adopt a position on one or more of these alternatives that may obviate the difficulties entailed by the court of appeals' decision. *** Thus, the Commission's ultimate disposition of the case on remand may not be affected by the court of appeals' present decision." *Id.* at 11-12.

Contrary to the assertion of the federal respondents, the Commission's proceedings on remand will not obviate the need for review of the question presented. In a February 9, 1990 voting conference in this matter, the Commission made clear that it does not intend to dispute or challenge the court of appeals' interpretation of Section 11341(a) in its decision on remand. Transcript of Voting Conference at 14-15, 63-65, 74-75, *CSX Corp.—Control—Chessie System, Inc.*, Finance Docket No. 28,905 (Sub-No. 22) (Feb. 9, 1990). Proceedings on remand will therefore add nothing to the existing record with regard to the question presented by the instant petitions.

Moreover, the Commission's decision on remand will address issues relating only to labor. *Id.* But the court of



appeals' decision may be applied not only to collective bargaining agreements, but also to other private contracts. The Commission's decision on remand will not affect this important aspect of the decision below.

Thus, the question presented by these petitions is now ripe. Nothing can be gained from further delay. Without prompt review of the judgment, corporate planning decisions will be significantly disrupted and the resulting uncertainty will adversely affect the public interest. *See supra* at 2, 12-14.[15]

## CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be granted.

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[15] We submit that, even if this Court were to accept the federal respondents' invitation to wait until completion of the proceedings on remand (along with appellate review of such proceedings), it should not deny the petitions in these cases. Rather, it should defer their consideration so that it may consider the question they present at the same time it considers the issues presented by the remand proceeding.